No. 10258

In the United States

Circuit Court of Appeals

For the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY, a corporation,

Appellant

vs.

RETA D. MILLER and WARREN D. MILLER, MARCIA M. MILLER, Minors, by Reta D. Miller, Guardian,

Appellees

Appellant's Reply Brief

Upon Appeal from the District Court of the United States for the District of Oregon

Hon. Claude McColloch, Judge

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LANE-MILES STANDISH CO.

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STATEMENT

Appellants in this Reply Brief will endeavor to arrange its argument to coincide with the arrangement used by appellees in their brief. Apparently ap-

pellees have arranged their argument under the Specifications of Error and also under different points. Appellant has endeavored to reply to the various points raised by appellees under the Specifications of Error as near as practicable, and where not practicable has designated the argument under appellees' points.

SPECIFICATIONS OF ERROR 1 TO 5

Argument

Appellees' argument under the above specifications of error is to the effect that it was incumbent on the appellees to prove that the insured acted in good faith and it was therefore competent to show that the entries on the check stub (Pl. Ex. 6, Tr. Pages 160-162), and also competent for Mrs. Miller to testify (Tr. Pages 152-156) that she mailed a money order to appellant after the check had been returned because of its dishonor, in order for her to show good faith. Appellees then argue that even if it was error to receive the evidence it was harmless and was cured by the Court's instructions.

In the first place, there never was any issue in this case with reference to the good faith of the insured in giving his check in payment of the premiums in question. The one and only question in the case is whether

the premiums in question were paid. If they were paid it was because as appellees contended the check dated November 17, 1940, was given by the insured and accepted by the appellant as unconditional payment of the premiums in question (Pre-trial Order, Tr. Pages 44-48). The check stub (Pl. Ex. 6), the money order (Pl. Ex. 8c), the letter returning the money order (Pl. Ex. 8a), and the testimony of Mrs. Miller with reference to the money order had absolutely no bearing on the question of the acceptance of the check as unconditional payment.

It makes no difference whether the evidence question is to be determined by the Oregon Statutes or the Federal Rules of Procedure as in neither case would irrelevant and immaterial evidence be admissible.

Appellees have not argued that the agent Yount had any authority to bind appellant and have made no effort to justify the admission of the evidence objected to under Specification of Error 1.

It is appellant's contention that the admission of the evidence under Specifications of Error 1 to 5 constituted error. The reception of such evidence as this cannot be cured by an instruction of the Court. In other words, you cannot unring a bell. When this evidence was received it made its impression on the jury and this impression could not be and was not erased by an instruction to disregard it.

SPECIFICATIONS OF ERROR 6, 7 AND 8

Argument

Appellees have not cited any additional authorities under Specification of Error 6 but have discussed the authorities cited by appellant under that specification. Appellees' argument under Specifications of Error 7 and 8 pertains to the matters considered under Specification of Error 6, so reference to all three will be made under this heading.

As appellant understands appellees' argument under Specifications of Error 7 and 8 it is substantially as follows: (1) There was no liability on the part of the insured to pay the premiums, but when he gave his check (post dated as claimed by appellees) he became personally liable on the check and a new obligation arose. (2) Under such circumstances the presumption is that the check was accepted as payment on delivery thereof.

To sustain this argument appellees have cited the negotiable instruments law and cases dealing with that law. It should be pointed out here that there is no question in this case with reference to the negotiable instrument law. The question is not whether the check was accepted but whether it was accepted as condi-

tional or unconditional payment. It is appellant's contention that the burden was upon appellees to prove that the check was accepted as unconditional payment, and the cases cited by appellant in its brief are to that effect. Apparently appellees recognize this rule as applied to a check presently dated but argue that where there is a post dated check the rule is different because the giving of a post dated check creates a valid legal obligation which the insurer could enforce.

Appellees have placed emphasis on the fact that the check in the instant case was dated subsequent to the date on which the insured gave the check to the agent. They argue that it is therefore a post dated check. Appellees do not point out, however, that the check was dated within the grace period provided in the policies. Appellees argue that the acceptance of a post dated check has the effect to extend credit. If credit was extended it would have to be for a period subsequent to the expiration of the grace period. Where the check is dated within the grace period there can be no extension of credit to the date of the check, because as a matter of right the insured under the terms of the policies had all of that time within which to pay the premiums. The situation is the same as if the insured had come in on the last day of grace and gave a presently due check in payment.

The case of *Republic Life Acc. Ins. Co. v. Hatcher*, 244 Ky. 574; 51 S.W. (2d) 922, cited by appellees is not in point. That case involves a first premium paid to an authorized agent and accepted by the agent as payment of the premium. The agent remitted to the company. The check was not dishonored when presented for payment.

On Page 32 of their brief appellees state as a proposition of law:

> "A post dated check, received by an insurer, within the grace period, for the payment of a life insurance premium, which is held by the insurer for a period of five days, without notice to the insured, and until after the period of grace had expired, operates as a payment of the premium."

This proposition, even if true, could not be applicable to the instant case because even though the Miller check was received within the grace period it was not dated subsequent to the grace period and was not held until after the expiration of the grace period. The check was deposited by appellant on the last day of grace.

The principal case relied upon by appellees is *John Hancock Mutual Life Insurance Co. v. Mann*, C. C. A. 7th Circuit; 86 Fed. (2d) 783. That case, instead of being on all fours with the instant case, as claimed by appellees, is easily distinguished. In that case the

insured was dealing with the general agents of the insurer, who upon receipt of the check notified the home office of the payment without specifying the manner of payment. Furthermore, the check was dated after the expiration of the grace period and it was payable to the insurer's general agents and not to the company. The case is not in point because (1) The check in the instant case was not dated after the expiration of the grace period; (2) There is a limitation of authority in the policies in the instant case not present in that case, and (3) There was no conduct in the instant case indicating an acceptance of the check as unconditional payment. On the contrary, the conditions contained in the official receipts clearly demonstrated that the check was accepted as conditional payment.

Equitable Life Assurance Society v. Brandt, 240 Ala. 260; 198 So. 595; 134 A. L. R. 555, is not a case dealing with the question of the payment of premiums with a worthless check. That case is concerned with the question of a remittance pursuant to letters from the insurer where there had been a lapse of a policy. It was held that under the peculiar circumstances of that case it was a question for the jury whether the insurer had accepted the check. Those circumstances or similar circumstances are not present in the instant case.

The case of *Olga A. Martin v. New York Life Insurance Co.*, 30 N. M. 400; 234 Pac. 673; 40 A. L. R. 406, cited by appellees, recognizes the rule contended for by appellant when the Court in its opinion says:

> "In connection with this subject, we think the mere delivery to the insurer of a worthless check or bank draft, which is dishonored when presented for payment, in the absence of any fact or circumstance indicating an agreement on the part of the insurer to accept it as payment of the premium then due, does not operate to waive the right of forfeiture upon its nonpayment, as the general rule of commercial transactions is that the receipt of such check or draft is predicated upon the implied understanding that it will be paid."

In the case of *Williams v. Employers' Liability Assurance Corporation*, C. C. A. 5th Circuit, 69 Fed. (2d) 285, cited by appellees, the insured was dealing with an agent who had authority to extend credit and who did extend credit to the insured. There was a question as to how long he had extended credit and the Court held that under the facts of the case it was a question for the jury. The facts of that case are not even similar to the facts of this case.

Appellees argue that forfeitures are not favored in law. Appellant does not argue against that proposition, but it is likewise true that if a forfeiture has occurred the Courts will recognize and enforce it. Before a for-

feiture can be waived there must be some definite action on the part of the insurer indicating an intention to waive the same. There was no such action in this case. The insured was not lead to believe that his policy would be in force beyond the grace period if his check was not honored. It would take a strong imagination to say that the insured ever intended that the company would accept his check in any other manner than the ordinary transaction, or that he ever believed that his insurance would be in force if the check was not honored. There certainly was no action on the part of appellant that would justify such a belief even if he did have it.

In the case of *Lincoln National Life Insurance Co. v. Bastian*, 31 Fed. (2d) 859, C. C. A. 4th Circuit, cited by appellees, the court in its opinion quotes from *Veal v. Security Mutual Life Insurance Co.*, 6 Ga. App. 721; 65 S. E. 714, as follows:

> "If the holder of a policy of life insurance sends to the company on the day the premium is due a check in payment thereof, and when the check is presented at bank, payment is refused because of lack of funds to the credit of the drawer, the company, although it has delivered the premium receipt to the insured, may, by taking proper steps, repudiate the transaction for the legal fraud resulting from the insured's having sent a check without having in bank the funds to meet it, and may

> enforce a lapse of the policy for non-payment of premium. But if the company, in such a case, after notice that the check had been dishonored, retains it, and instead of repudiating the transaction by returning the check and demanding back its receipt, insisted upon the insured's paying it after the date on which the policy would otherwise have lapsed, a waiver of the punctual payment of the premium in cash results. If the insurance company accepts and retains a note, check, or other interest-bearing obligation for the premium, the policy will not be held to be lapsed or forfeited for non-payment of premium, even though the note or other obligation is not paid at maturity."

In the instant case appellant did exactly the things indicated by the Georgia court to be sufficient to enforce a lapse of the policies.

It is appellant's contention that payment of the premiums in question was not affected by the mere giving of the check, but it was conditioned upon the check being honored when presented for payment in the absence of an agreement to accept the check as unconditional payment. The Oregon Supreme Court in *Smith v. Mills*, 112 Ore. 496; 230 Pac. 350, held that in order that the acceptance of a cashier's check should constitute payment the transfer must be by an agreement of the parties with that understanding. In *Seaman v. Muir*, 72 Ore. 583; 144 Pac. 121, it held that the execution and delivery of negotiable paper is not pay-

ment unless the same is accepted by the parties in that sense, and in *Joppa v. Clark Commission Co.*, 132 Ore. 21; 281 Pac. 834, it held that a promissory note does not discharge an obligation in the absence of an agreement to that effect, and that when a debtor gives his check the prima facie presumption arises that the check is taken merely as conditional, not absolute payment, and if there is an agreement to the contrary it must be proved by clear and satisfactory evidence.

In the instant case there is absolutely no evidence that the check in question was either given or received in any other manner than in the ordinary transaction. Furthermore, the conditional receipts mailed out by appellant clearly demonstrated that the check was received conditionally and not unconditionally.

APPELLEES' POINT V

Argument

On Page 38 of their brief appellees state a point as follows:

> "The question of acceptance of the post dated check as payment of the insurance premiums, and the authority of the cashier so to do, were questions of fact for the jury to be inferred from circumstances in the case unless only one reasonable inference may be drawn therefrom."

An examination of the authorities cited under the point fails to disclose a single one of them that states or approves the point stated.

The quotations in the appellees' brief from the cases of *New York Life Insurance Company v. Lois Rogers*, 126 Fed. (2d) 784, and *Order of United Commercia Travelers v. Campbell*, 115 Fed. (2d) 743, have to do with waiver. Appellant does not argue that it could not waive a forfeiture or any of its rights or requirements. The waiver must be made, however, by an authorized person and there must be evidence of such waiver. In the instant case there is absolutely no evidence of waiver and there is no evidence that any of the persons dealing with the premiums in question had any authority to waive any of the company's rights or requirements with respect to payment.

The case of *Hockert v. New York Life Insurance Co.*, (Iowa) 276 N. W. 422, cited by appellees, is not applicable. In that case the insured sent a check together with a blue note in response to a letter directed to him stating in effect that if he mailed the blue note and his remittance by a certain date the premium payment would be extended. The Court was of the opinion that the insured did exactly what he was requested to do. It held that this circumstance, together with other circumstances, was sufficient to sustain a finding that the blue note and the check had been accepted and treated as cash. Those facts are not present in the instant case.

In the case of *Martin v. New York Life Insurance Co.*, 30 N. M. 400; 234 Pac. 673; 40 A. L. R. 406, cited by appellees, it should be noted that the receipt which was forwarded to the insured did not contain the conditions contained in the receipts in the instant case. In the Martin case the Court felt that the sending of the official receipt without the conditional limitation indicated that the company received the check as payment, so that the burden would rest upon it to show otherwise. The distinction between that situation and the situation where the receipt contains the conditions as in the instant case is brought out in *Central States Life Insurance Co. v. Johnson*, 181 Okla. 367; 73 Pac. (2d) 1152, which refers to the Martin case and distinguishes it.

The case of *New York Life Insurance Co. v. Seifris*, C. C. A. 3rd Circuit, 46 Fed. (2d) 391, cited by appellees, concerns the payment of the first premium on a policy in the hands of the insured which recited that the premium had been paid. In such a case the Court held that the burden rested with the company to show that the premium was not paid. That is quite different from this case.

APPELLEES' POINT VI

Argument

Appellees in their brief (Page 43) refer to the Supplemental Memorandum prepared by the Honorable Claude McColloch, dated October 15, 1942. This memorandum was prepared after the appeal in this case and after the transcript of the record had been forwarded to the clerk for printing. It was, therefore, not included in the stipulation with reference to the contents of the record on appeal to be printed.

In the Supplemental Memorandum (Tr. Page 251) the Court stated that "counsel for the company with commendable frankness defended the case on the basis that the acceptance of the post dated check put the company on the same footing as if it had taken a promissory note."

Judge McColloch apparently inadvertently misconstrued the position of the defendant. The defendant did not take that position, at least did not intend to do so, in the trial court. The position taken by the defendant in the trial court is the exact position taken by it in this court. There was some discussion before the court with respect to whether a post dated check would be the same as a promissory note, and the de-

fendant took the position that even if it were a promissory note it would make no difference as under the Oregon cases the acceptance of a promissory note would not constitute unconditional payment in the absence of an agreement to that effect.

Appellant agrees that the insurance policies involved herein were delivered in Oregon and that the Oregon law applies. That is the reason that the appellant cited the cases of the Oregon Supreme Court with respect to the effect of giving a check or promissory note as payment, and which hold that before a check or note can be said to be received as absolute payment or unconditional payment an agreement to that effect must be shown by clear and satisfactory evidence.

The Oregon cases cited by appellees with respect to the authority of an agent are not contrary to appellant's contention. Appellees have failed to show how these cases benefit them as applied to the facts of this case. The Oregon cases uphold appellant's contention that there must be evidence of waiver by an authorized agent. There was no evidence in this case of waiver or of any authority of an agent to waive, or that the company held out any agent as having such authority. To the contrary, the policies provided for payment in cash and expressly provided that no agent was authorized to make or modify the contract or to extend the

time for the payment of premiums or to waive any lapse or forfeiture of any of the company's rights or requirements. The applications which were made a part of the policies and constituted a part of the contract provided that only the President, a Vice-President, a Secretary or the Treasurer of the company could make, modify or discharge contracts or waive any of the company's rights or requirements. These were not secret instructions but instructions that were printed in the policies which the insured had in his possession. As stated in *Bartnick v. Mutual Life Insurance Company of New York*, 154 Ore. 446; 60 Pac. (2d) 943, the insured was bound to know the terms of his policies.

APPELLEES' POINT VII

Argument

Appellees have asked this court to affirm the trial court's judgment and allow appellees an additional attorneys' fee in this court citing as their authority Section 101-134 *O. C. L. A.*, and *Horowitz v. New York Life Insurance Co.*, 80 Fed. (2d) 295.

Section 101-134 *O. C. L. A.* provides as follows:

> "Whenever any suit or action is brought in any court of this state upon any policy of insurance of any kind or nature whatsoever * * * * * the plaintiff in addition to the amount which he may

> recover shall also be allowed and shall recover, as part of said judgment such sum as the court or jury may adjudge to be reasonable as attorneys' fees in said suit or action; * * * * * * * *. If attorneys' fees are allowed as herein provided and on appeal to the Supreme Court by the defendant the judgment is affirmed the Supreme Court shall allow to the respondent such additional sum as the court shall adjudge reasonable as attorneys' fees of the respondent on such appeal * * * * * * * *."

The case of *Horowitz v. New York Life Insurance Co. Supra,* was a case in which the defendant secured a decree in the trial court which was reversed by this court. This court dealing with the forepart of the above statute held that the insured was entitled to attorney's fees and fixed attorney's fees to be allowed in the judgment to be entered in the trial court in favor of the plaintiff.

This court in *American Surety Company of New York v. Fischer Warehouse Co., et al,* 88 Fed. (2d) 536, on the basis of the latter part of the Oregon statute allowed an additional attorneys' fee on appeal where the judgment of the trial court was affirmed. The court cited as its authority *Horowitz v. New York Life Insurance Co. Supra.*

Appellant does not agree that this court has authority to grant additional attorney's fees in the event it should affirm the judgment of the trial court. The Court's attention is called to the Oregon statute, the forepart of which provides for attorneys' fees whenever

any suit or action is brought in any court of the state. That wording is broad enough to include the Federal District Court. The latter part of the statute, however, provides for attorneys' fees on an appeal to the Supreme Court, meaning the Oregon Supreme Court. The wording of the latter part of the statute is not broad enough to include the Circuit Court of Appeals.

Appellant is of the opinion that in the event this court affirms the trial court then it should further consider the Oregon statute with reference to attorneys' fees and reverse its decision in *American Surety Co. of New York v. Fischer Warehouse Co., et al, Supra.*

CONCLUSION

The evidence admitted over appellant's objection and referred to under Specifications of Error 1 to 5 inclusive was irrelevant and immaterial to the issues in the case and served to create prejudice against appellant before the jury. The reception of this evidence constituted reversible error.

The evidence in the case failed to show that the premiums due on the policies on October 17, 1940, were paid when due or within the grace period. The evidence failed to show any agreement between the insured and appellant that the check dated November 17, 1940, was accepted as unconditional payment. There being no

such evidence it must be presumed that the check was received as conditional payment. The check was dishonored when presented for payment. Consequently, the premiums were not paid and the policies lapsed according to their terms and were not in force on the date of death of the insured. The trial court should therefore have directed a verdict in favor of appellant.

The instructions of the trial court to the jury did not fairly present the case to the jury. Appellant objected to the court's instructions and these objections were overruled. This also constituted reversible error.

It is appellant's opinion that this court should reverse the trial court and direct that judgment be entered in favor of appellant on both causes of action. If the court is of the opinion that appellant was not entitled to a directed verdict then the court should reverse the trial court and direct that a new trial be had in view of the errors of the trial court in admitting prejudicial testimony on irrelevant and immaterial matters, and also because of errors in instructions to the jury.

Respectfully submitted,

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